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## Drunk Drivers Beware! Nebraska Adopts Administrative License Revocation

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# Drunk Drivers Beware! Nebraska Adopts Administrative License Revocation\*

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## I. INTRODUCTION

“If you drink too much and drive, the least you lose is your license, guaranteed.”<sup>1</sup> Under this battle cry, the Nebraska Unicameral Legis-

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\* The author gratefully acknowledges the advice and guidance of Paul Potadle, Assistant Attorney General for the State of Nebraska.

1. *Public Hearing on LB 291 Before the Committee on Transportation*, Ninety-Second Legislature, 1st Sess. 42 (1991) [Hereinafter *Public Hearing*] (Statement of

lature enacted LB 291.<sup>2</sup> When the new law took effect on January 1, 1993, Nebraska joined thirty-one other states<sup>3</sup> in implementing a complete system of administrative license revocation. Administrative license revocation (hereinafter ALR), also referred to as "administrative per se" or "summary suspension," establishes an administrative process, independent of the criminal justice system, whereby the driving privileges of an intoxicated motorist may be immediately revoked. Under the ALR scheme, law enforcement officers, as agents of the Department of Motor Vehicles, are authorized to seize the driver's license of a motorist who either fails a chemical test or who refuses to submit to a chemical test.<sup>4</sup> Upon seizure, the motorist receives a temporary license valid for only a short period of

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Senator Emil Beyer, Principal Introducer)(quoting Oregon's Traffic Safety Commission).

2. LB 291, 1992 Neb. Laws 125-49, was signed by Governor Nelson on April 17, 1992, and took effect on January 1, 1993. The bill was first introduced in 1991 and referred to the Committee on Transportation. A public hearing was held on the bill on February 12, 1991. The measure remained in committee for the duration of 1991 while an interim study (LR 84, NEBRASKA LAW AND THE IMPAIRED DRIVER: AN OVERVIEW, REPORT OF THE COMMITTEE ON TRANSPORTATION OF THE NEBRASKA LEGISLATURE, Ninety-Second Legislature, 1st Sess. (1991)) was completed. The bill was reintroduced as LB 291 in 1992 and subsequently passed by the Legislature. The provisions amended by the bill are codified as amended at NEB. REV. STAT. §§ 28-106; 28-306; 39-603; 39-669.07; 39-669.08; 39-669.09; 39-669.11; 39-669.12; 39-669.14 to 39-669.17; 39-669.39; 39-6,104.08; 39-6,122; 60-498; 60-4118; 60-4,129; 71-1,103 (Cum. Supp. 1992).
3. Alaska, ALASKA STAT. §§ 28.15.165-166 (Supp. 1992); Arizona, ARIZ. REV. STAT. ANN. § 28-691 (Supp. 1991); California, CAL. VEH. CODE § 13353, 13353.2 to .4 (West Supp. 1992); Colorado, COLO. REV. STAT. § 42-2-122.1 (Supp. 1992); Connecticut, CONN. GEN. STAT. § 14-227b (West Supp. 1992); Delaware, DEL. CODE ANN. tit. 21, § 2740-50 (1985); Florida, FLA. STAT. ANN. § 322.261 to .2615 (West Supp. 1992); Hawaii, HAW. REV. STAT. § 286-251 to -266 (Supp. 1991); Illinois, ILL. ANN. STAT. ch. 95§, para. 11-501.1 (Smith-Hurd Supp. 1992); Indiana, IND. CODE ANN. § 9-30-6-8 to -9 (Burns Supp. 1991); Iowa, IOWA CODE ANN. § 321J.9, 321J.12 (West Supp. 1992); Kansas, KAN. STAT. ANN. § 8-1002 (1991); Louisiana, LA. REV. STAT. ANN. §§ 32:667 to :669 (West 1989 & Supp. 1992); Maine, ME. REV. STAT. ANN. tit. 29 § 1311-A (West Supp. 1991); Maryland, MD. TRANSP. CODE ANN. § 16-205.1 (1992); Michigan, MICH. COMP. LAWS ANN. § 257.625g (West Supp. 1992); Minnesota, MINN. STAT. ANN. § 169.123 (West 1986 & Supp. 1992); Mississippi, MISS. CODE ANN. § 63-11-21, 63-11-23 (Supp. 1992); Missouri, MO. ANN. STAT. §§ 302.500 to .540 (Vernon Supp. 1992); Nevada, NEV. REV. STAT. §§ 484.385-387 (1991); New Mexico, N.M. STAT. ANN. § 66-8-111, -111.1, -112 (Michie Supp. 1992); North Carolina, N.C. GEN. STAT. § 20-16.5 (Supp. 1991); North Dakota, N.D. CENT. CODE §§ 39-20-03.01, 39-20-05 (Supp. 1991); Ohio, OHIO REV. CODE ANN. § 4511.191 to .193 (Anderson Supp. 1991); Oklahoma, OKLA. STAT. ANN. tit. 47, § 754 (West Supp. 1992); Oregon, OR. REV. STAT. § 813.410 (1991); Utah, UTAH CODE ANN. § 41-2-130 (Supp. 1992); Vermont, VT. STAT. ANN. tit. 23 § 1205 (Supp. 1992); West Virginia, W.VA. CODE §§ 17C-5A-1 to -4 (1991 Supp. 1992); Wisconsin, WIS. STAT. ANN. § 343.305 (West 1991 & Supp. 1992); Wyoming, WYO. STAT. §§ 31-6-102 to 104 (1989).
4. MODEL REVOCATION ON ADMINISTRATIVE DETERMINATION (ROAD) LAW § 5, *re-printed in*, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPART-

time and is given an opportunity to appeal the revocation with the Department of Motor Vehicles.<sup>5</sup>

The ostensible purpose of the move to ALR was to deter persons from driving under the influence of alcohol by providing a "swift and certain" method for administratively revoking the driving privileges of persons who fail or refuse a chemical test.<sup>6</sup> Under the previous law, it often took from six to ten months for the license revocation process (criminal and/or administrative) to be completed.<sup>7</sup> Under the new statutory scheme, administrative revocation is to be completed within approximately thirty days.

Evidence from other states supports the fact that ALR is effective as a deterrent. Many states that have enacted an ALR scheme have seen a drop of five to ten percent in the number of alcohol-related traffic fatalities.<sup>8</sup> Beyond the obvious social benefit of saving lives, there is evidence that ALR results in an overall economic benefit to society. A study by the U.S. Department of Transportation found that as a result of the implementation of ALR in Nevada, Mississippi, and Illinois, the citizens of those states avoided literally tens of millions of dollars in costs associated with nighttime accidents.<sup>9</sup>

Lest we give too much credit to state legislators for their vision and initiative, it is important to note that the federal government is the driving force behind the nationwide move to ALR. Using the carrot-and-stick approach of "incentive funding," Congress has authorized basic and supplemental grants to those states that implement a prescribed number of measures such as ALR to combat drunk driving and promote highway safety.<sup>10</sup> Nebraska took a major step toward quali-

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MENT OF TRANSPORTATION, REDUCING HIGHWAY CRASHES THROUGH ADMINISTRATIVE LICENSE REVOCATION 27, 30-31 (1986).

5. *Id.* §§ 5, 9 at 30-31, 36-37.

6. LB 291 § 9(1); NEB. REV. STAT. 39-669.15(1)(Cum. Supp. 1992).

7. *Public Hearing*, *supra* note 1, at 65 (Statement of Fred Zwonechek, Administrator, Nebraska Office of Highway Safety, Department of Motor Vehicles).

8. LR 84, NEBRASKA LAW AND THE IMPAIRED DRIVER: AN OVERVIEW, REPORT OF THE COMMITTEE ON TRANSPORTATION OF THE NEBRASKA LEGISLATURE, Ninety-Second Legislature, 1st Sess., at 97-113 (1991). See also H. Laurence Ross, *Administrative License Revocation in New Mexico: An Evaluation*, 9 LAW & POL'Y 5, 13-14 (1987).

9. JOHN H. LACEY, ET AL., COST-BENEFIT ANALYSIS OF ADMINISTRATIVE LICENSE SUSPENSIONS, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION ix (1991)(Executive Summary of Report No. DOT HS 807 689).

10. Since 1983, the Secretary of Transportation has offered basic and supplemental grants to states which meet a number of criteria as set forth in 23 U.S.C. § 408 (1988). Funds available through § 408 may be received by states in no more than five fiscal years and may not exceed a specified percentage of the costs to implement the state's alcohol traffic safety program. For a detailed discussion of Nebraska's eligibility for such funds, see LR 84, *supra* note 8, at 68-76.

Also, in light of the fact that some states are no longer eligible for § 408 funds,

fyng for such grants with the passage of LB 291. If the Secretary of Transportation determines that compliance is complete, Nebraska could be eligible for grants totaling more than \$500,000 in the first fiscal year under ALR.<sup>11</sup>

Given the federal incentives and evidence of the lives saved by ALR in other states, it appears that the action of the Nebraska Legislature was appropriate. That is not to say, however, that the move to ALR will be simple. There are immediate and tangible obstacles to its implementation that must be taken seriously. The most obvious obstacle is the strain that ALR will place on the administrative resources of the Department of Motor Vehicles. In other states, ALR has resulted in literally thousands of appeals, necessitating more hearing officers, more state lawyers, and more of all the resources necessary to conduct such proceedings.<sup>12</sup> Administrative officials face the uncertainty of applying a new law and implementing the new procedures that accompany it. In addition, ALR places a significant burden on law enforcement officers who must deal with additional paperwork and hearing appearances. Imposing such a burden may dampen the enthusiasm of the very individuals upon whom the success of ALR depends.<sup>13</sup> Ironically, because administrative revocation orders are appealable in district court, ALR may also add to the congestion in the court system it seeks to avoid.<sup>14</sup>

With an eye toward alleviating some of the difficulties involved in

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Congress recently enacted a new program of this type to run from 1993 through 1997. 23 U.S.C.A. § 410(j)(West Supp. 1992). The § 410 program provides basic and supplemental grants based on states' implementation of highway safety programs such as an expedited driver's license suspension or revocation system, a plan to reduce the legal blood alcohol level to .08 percent, a statewide program of roadside sobriety checkpoints, a statutory scheme aimed at preventing minors from driving under the influence, open container laws, and a system whereby persons convicted of driving under the influence are subject to suspension of their vehicle registration and surrender of their license plates. *Id.* § 410(a)-(e). Under the program, if a state is not eligible in a given fiscal year, the funds apportioned to that state are reapportioned among the qualifying states. *Id.* § 410(g).

11. LR 84, *supra* note 8, at 71. See also *Public Hearing*, *supra* note 1, at 66 (Statement of Fred Zwonechek, Administrator, Nebraska Office of Highway Safety, Department of Motor Vehicles).
12. LR 84, *supra* note 8, at 95-96. See also James Latchaw, Overcoming Problems and Costs of Administrative Hearings, in NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, REDUCING HIGHWAY CRASHES THROUGH ADMINISTRATIVE LICENSE REVOCATION 73 (1986).
13. In a study conducted in New Mexico, one commentator noted a negative reaction to ALR among law enforcement officers and among members of the judiciary. Ross, *supra* note 8, at 9-11.
14. The Nebraska ALR statutes do not exempt Department of Motor Vehicles decisions from the Administrative Procedure Act. Under NEB. REV. STAT. § 84-917 (Cum. Supp. 1992), a person aggrieved by the decision of a state agency may appeal that decision in district court. The number of revocation orders which are ultimately challenged in district court will likely depend on the willingness of

the transition to ALR, this Note will examine the administrative portion of Nebraska's drunk driving laws.<sup>15</sup> To that end, the following sections trace the development of drunk driving law in Nebraska, explore the issues that may be raised under the new ALR scheme, and look forward to the direction that Nebraska drunk driving law may take in the future.

## II. DEVELOPMENT OF DRUNK DRIVING LAW IN NEBRASKA

Nebraska's attempt to protect society from the drunk driver began in 1911 when the Legislature made it a misdemeanor for "any person under sixteen years of age or for an intoxicated person to operate a motor vehicle."<sup>16</sup> The advent of the chemical test came in 1949, when a statute was enacted that provided for the creation of presumptions regarding intoxication based upon the chemical analysis of an individual's blood, spinal fluid, or urine.<sup>17</sup> Under the law, however, an alcohol concentration of .15 percent or greater gave rise only to a rebuttable presumption that the individual was under the influence of alcohol and specifically provided that guilt could not be inferred from refusal to submit to a test.<sup>18</sup>

Administrative involvement in the realm of DWI law began in 1959 with the introduction of implied consent and administrative revocation for refusals.<sup>19</sup> Under the law, every person operating a motor vehicle on a public highway was deemed to have given his or her consent to submit to a chemical test.<sup>20</sup> Any person refusing to submit to a chemical test could have his or her license revoked by the Director of the Department of Motor Vehicles after a proper administrative hearing.<sup>21</sup>

The last major evolutionary step in Nebraska law in this area occurred in 1971.<sup>22</sup> In that year, a bill was passed which repealed the

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judges to grant or deny temporary stays. *See infra* text accompanying notes 162-63.

15. To the extent that they do not impact the administrative revocation process, this Note does not address issues relating to criminal prosecutions for driving while intoxicated. Nor does this Note examine Nebraska's drunk driving statutes as they relate to the commercial driver. The following sections focus solely on the administrative revocation process as it relates to ordinary motor vehicle operators.
16. Chap. 115 § 6, 1911 Neb. Laws 398, 400. Legislation prior to this time was directed at persons operating carriages. *See* Act of March 1, 1879, §§ 61-62, 1879 Neb. Laws 120, 133-34.
17. Chap. 116, LB 88 § 2, 1949 Neb. Laws 309, 311-12.
18. *Id.*
19. Chap. 168, LB 694, 1959 Neb. Laws 613.
20. *Id.* at § 1, 1959 Neb. Laws at 613.
21. *Id.* at § 7, 1959 Neb. Laws at 614-15.
22. LB 948, 1971 Neb. Laws.

scheme of statutory presumptions based upon chemical test results and created a scheme of *per se* violations. Simply having a .10 percent alcohol concentration in one's body fluid became a *per se* violation of the law.<sup>23</sup> As such, the chemical test became even more the centerpiece of drunk driving litigation.

Legislation between 1971 and 1991 made only minor changes to the drunk driving statutes. During that period, the Legislature focused primarily on increasing the penalties for driving under the influence and sought to fine-tune the provisions of the *per se* scheme in reaction to various decisions of the Nebraska Supreme Court.<sup>24</sup>

As such, on the eve of the transition to ALR, the role of the Department of Motor Vehicles in drunk driving cases was relatively limited. Prior to January 1, 1993, a motorist arrested on suspicion of driving while intoxicated was subject to administrative revocation only if he or she refused to submit to a chemical test.<sup>25</sup> Upon such a refusal, the motorist retained his or her driving privileges until a hearing was conducted and the Director of the Department of Motor Vehicles made a formal determination that the refusal was unreasonable.<sup>26</sup> If the motorist consented to a test and failed, any subsequent license revocation was the result of a criminal conviction for driving while intoxicated without administrative involvement.<sup>27</sup> Under LB 291, the role of the Department of Motor Vehicles will be anything but limited.

### III. LB 291: EXPANDING THE ADMINISTRATIVE ROLE

LB 291 is easily the most significant piece of drunk driving legislation passed in Nebraska in more than twenty years. In addition to adjusting certain provisions of the existing scheme,<sup>28</sup> LB 291 makes

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23. *Id.* at § 1.

24. The following major bills were enacted during this period: LB 651, 1980 Neb. Laws 500 (granting judges the discretion to require alcohol treatment as a condition of probation); LB 568, 1982 Neb. Laws 517 (amending penalty and sentencing provisions); LB 153, 1986 Neb. Laws 216 (amending penalty and sentencing provisions); LB 404, 1987 Neb. Laws 945 (establishing more specific standards for alcohol content in a motorist's blood, breath, or urine in reaction to *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987)); LB 377, 1988 Neb. Laws 356 (providing that the Director may reinstate licenses revoked for refusal where the motorist agrees to plead guilty to driving under the influence and providing that a revocation period does not begin until all appeals have been exhausted); LB 799, 1990 Neb. Laws 358 (amending statutory language to encompass persons under the influence of drugs).

25. NEB. REV. STAT. § 39-669.15 (Reissue 1988)(amended 1992).

26. NEB. REV. STAT. § 39-669.16 (Reissue 1988)(amended 1992). In addition, if the motorist agreed to plead guilty to driving under the influence, the administrative revocation process was terminated. *Id.*

27. NEB. REV. STAT. § 39-669.07 (Supp. 1990)(amended 1992).

28. In addition to the major amendments concerning implementation of ALR, LB 291 included a number of significant changes which fall outside the scope of this

profound changes to Nebraska law by implementing a system of administrative license revocation (ALR). By greatly expanding the role of the Department of Motor Vehicles, the new law represents not only a change in procedure, but a change in philosophy. Previous deterrence efforts have focused on establishing severe penalties. Under ALR, the penalties remain substantial,<sup>29</sup> but the focus shifts to swift and certain punishment. Under ALR, an inebriated motorist will likely lose his or her license long before a criminal trial even begins. To implement this approach, LB 291 looks to law enforcement officers and the Department of Motor Vehicles for the efficiency that clogged courts have been unable to provide.

Under prior law, the administrative process was triggered only if the motorist refused to submit to a test. LB 291 expands the role of the Department of Motor Vehicles by subjecting both motorists who refuse a test and motorists who fail a chemical test to the administrative revocation process.<sup>30</sup> In so doing, the bill establishes an independ-

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Note. Concerning criminal penalties, the bill implemented new mandatory minimum and maximum sentences for second, third, and fourth convictions for driving while intoxicated. LB 291 § 1(1); NEB. REV. STAT. § 28-106(1)(Cum. Supp. 1992). In addition, the bill established minimum and maximum license revocation periods for motor vehicle homicide and for inflicting serious bodily injury by operating a motor vehicle while under the influence. LB 291 §§ 2, 13; NEB. REV. STAT. §§ 28-106, 39-669.39 (Cum. Supp. 1992). In its final penalty adjustment, the bill implemented a requirement that first time offenders submit to an alcohol assessment at their own expense. LB 291 § 4(8); NEB. REV. STAT. § 39-669.07(8)(Cum. Supp. 1992). A number of questions concerning the implementation of these changes are addressed in an opinion issued by the Attorney General on June 29, 1992. 92 Op. Att'y Gen. 087.

Also of note is the fact that LB 291 eliminated urine testing from the *per se* scheme. As such, it is no longer illegal *per se* for a motorist to have "ten hundredths of one gram or more by weight of alcohol per one hundred milliliters [in] his or her urine." LB 291 § 4(1)(d). The decision of the Legislature in this regard was no doubt influenced by the supreme court's decision in *State v. Donaldson*, 234 Neb. 683, 452 N.W.2d 531 (1990), where the court struck down the procedure used to test urine.

Furthermore, LB 291 extended the reach of state drunk driving law. Instead of applying only to public highways, the provisions now apply everywhere in the state, with the exception of private property that is not open to public access. LB 291 § 3(1); NEB. REV. STAT. § 39-603(1)(Cum. Supp. 1992).

Finally, LB 291 expressly defined who may draw blood for the purposes of a blood test. Instead of relying on the rather vague term, "qualified technician," the Legislature specifically provided that trained persons employed by a licensed facility may draw blood for these purposes. LB 291 §§ 6-8, 17; NEB. REV. STAT. §§ 39-669.11 to 39-669.14, 71-1,103 (Cum. Supp. 1992).

29. A person who refuses to submit to a chemical test is subject to an administrative license revocation period of one year. LB 291 § 11(1); NEB. REV. STAT. § 39-669.16(1)(Cum. Supp. 1992). A person who fails a chemical test is subject to an administrative license revocation period of ninety days for a first offense and a revocation period of one year for subsequent violations. *Id.*
30. LB 291 § 5(4); NEB. REV. STAT. § 39-669.08(4)(Cum. Supp. 1992). By subjecting persons who fail a chemical test to administrative revocation, the number of per-



ent forum in which to litigate license revocation issues for all offenders and provides a vehicle to circumvent court delays.

In order to provide for "swift and certain" punishment in this new forum, LB 291 implements the revocation procedures that are the essence of ALR. Under previous law, a person refusing to submit to a chemical test was cited by the officer. The officer then prepared a sworn report that was forwarded to the Department of Motor Vehicles.<sup>31</sup> Upon receiving the report, the Director scheduled a hearing, which usually occurred some weeks (or months) later.<sup>32</sup> Only after the hearing, upon a finding that a refusal had occurred, would the Director finally revoke the motorist's license.<sup>33</sup> ALR turns this process on its head.

Under LB 291, persons arrested on suspicion of driving while intoxicated who are asked to submit to a chemical test face an expedited revocation process. Upon arrest, the motorist is advised of the consequences of refusing the test and the consequences of failing the test.<sup>34</sup> With one possible exception,<sup>35</sup> if the motorist then refuses to take the test or fails the test, the revocation process is set in motion.

Immediately upon refusal or failure, the officer, acting on behalf of the Director of the Department of Motor Vehicles, is to impound the motorist's license and verbally serve notice that the license will be automatically revoked thirty days from the date of the arrest unless a petition for hearing is filed with the Director within ten days of the date of arrest.<sup>36</sup> The officer then issues the motorist a thirty-day li-

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sions drawn into the administrative process increases exponentially. It is this increase that provides the potential for thousands of administrative hearings and district court appeals.

31. NEB. REV. STAT. § 39-669.15 (Reissue 1988)(amended 1992).

32. NEB. REV. STAT. § 39-669.16 (Reissue 1988)(amended 1992).

33. *Id.*

34. LB 291 § 5(9); NEB. REV. STAT. § 39-669.08(10)(Cum. Supp. 1992).

35. A careful reading of the statutes reveals a potential loophole in the otherwise broad coverage of ALR. Under the new scheme, only a "person arrested pursuant to section 39-669.08" is subject to administrative revocation. LB 291 § 9(2)-(3); NEB. REV. STAT. § 39-669.15(2)-(3)(Cum. Supp. 1992). Interpreted strictly, § 39-669.08 provides for arrest only where a motorist fails a preliminary breath test or refuses a preliminary breath test. LB 291 § 5(3); NEB. REV. STAT. § 39-669.08(2)(Cum. Supp. 1992). Thus, it is arguable that a motorist arrested in a jurisdiction where preliminary breath testing equipment is not available does not qualify as a "person arrested pursuant to section 39-669.08." Rather, the motorist is a person arrested for a violation of the general prohibition against drunk driving. LB 291 § 4; NEB. REV. STAT. § 39-669.07 (Cum. Supp. 1992).

Under such a reading of the statutes, a motorist who is not given a preliminary breath test, but submits to and fails a formal chemical test would not be subject to administrative revocation. It seems relatively clear, however, that the Legislature did not intend to create such a loophole and it remains to be seen how the courts will interpret the statutory language.

36. LB 291 § 9(4); NEB. REV. STAT. § 39-669.15(4)(Cum. Supp. 1992).

cense and provides an addressed envelope and a petition form that may be used by the motorist to request a hearing before the Director.<sup>37</sup>

Next, the officer is to prepare a sworn report stating that 1) the motorist was validly arrested for driving while intoxicated; 2) the motorist was requested to submit to a chemical test; 3) the motorist was advised of the consequences of failing a chemical test or refusing to submit to a chemical test; and 4) the motorist refused to submit to a chemical test or the test indicated the presence of alcohol in excess of statutory limits.<sup>38</sup> This report and the motorist's permanent license are then forwarded to the Department of Motor Vehicles.<sup>39</sup>

In some instances, however, it is impossible to follow this procedure. If, for instance, a blood test is taken and the results are not immediately available, an alternative method of revocation is provided. In such a case, the officer does not seize the license, but simply forwards the sworn report to the Department of Motor Vehicles when the test results are available. The Department then serves notice to the motorist by certified or registered mail.<sup>40</sup> In this mailing, the Department directs the licensee to surrender his or her license and supplies a temporary license and a petition form with which to request a hearing. The license revocation takes effect thirty days from the date of mailing unless the petition for hearing is postmarked or returned to the director within ten days after receipt of the notice of revocation.<sup>41</sup> If the permanent license has not been surrendered at the time the petition for hearing is received, the Director will reject the petition.<sup>42</sup>

As such, the initial phase of the "swift and certain" approach impounds the motorist's license immediately and provides only ten days to request a hearing. If a hearing is not requested, revocation is complete within thirty days and ALR has disciplined the drunk driver in only a month's time. Even if a hearing is requested, the emphasis on swift resolution continues. LB 291 requires the Director to conduct the hearing within twenty days after a petition is filed.<sup>43</sup> At the hearing, the issues that may be raised are limited. The statute provides that only the following issues may be raised: 1) whether the officer had probable cause to believe the motorist was operating a vehicle under the influence; 2) whether the motorist was lawfully arrested; 3) whether the motorist was advised of the consequences of refusing to submit to a chemical test or of failing a chemical test; and 4) whether

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37. *Id.*

38. LB 291 § 9(2)-(3); NEB. REV. STAT. § 39-669.15(2)-(3)(Cum. Supp. 1992).

39. *Id.*

40. LB 291 § 9(5); NEB. REV. STAT. § 39-669.15(5)(Cum. Supp. 1992).

41. *Id.*

42. *Id.*

43. LB 291 § 9(6); NEB. REV. STAT. § 39-669.15(6)(Cum. Supp. 1992).

the person actually refused to submit to a chemical test or whether the motorist's blood or breath contained an illegal concentration of alcohol.<sup>44</sup> At the conclusion of the hearing, the Director is allotted seven days in which to make a decision.<sup>45</sup>

Thus, even if a hearing is held, the revocation process is likely to be complete in fewer than thirty-seven days. Though the licensee may be able to prolong the hearing process somewhat, such delays do not postpone the punishment. The filing of a petition does *not* prevent automatic revocation of the license after thirty days.<sup>46</sup> Neither does a continuance of the hearing date stay the expiration of the temporary license, unless the continuance is requested by the Director.<sup>47</sup>

It is only after the administrative process is complete that the potential for substantial delay appears and ALR shows its vulnerable side. Persons aggrieved by an order of the Director are entitled to appeal in district court pursuant to the Administrative Procedure Act (hereinafter APA).<sup>48</sup> Under the APA, the district court judge may stay the order of revocation pending judicial review.<sup>49</sup> In such a case, the expedited administrative process necessarily succumbs to the very judicial delays it sought to avoid. In order to reach this point, however, the motorist must devote significant resources to his or her legal defense.

Even if the Director's order is not appealed, the administrative result remains vulnerable because of another link to the courts. For motorists who submit to a chemical test and fail, all administrative proceedings are dismissed or the motorist's license is immediately reinstated if criminal charges are not filed within thirty days of arrest, if the criminal charge is dismissed, or if the motorist is found not guilty of violating § 39-669.07.<sup>50</sup> In this way, the statutory scheme avoids the somewhat curious result of an administrative conviction and a criminal acquittal for the same offense.

#### IV. ISSUES IN ADMINISTRATIVE LICENSE REVOCATION

If the motorist does request an administrative hearing, there are a number of issues to be considered. In light of the significant changes outlined above, one might expect that the hearing officers of the Department of Motor Vehicles were thrown into uncharted legal terri-

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44. *Id.*

45. LB 291 § 9(7); NEB. REV. STAT. § 39-669.15(7)(Cum. Supp. 1992).

46. LB 291 § 9(6); NEB. REV. STAT. § 39-669.15(6)(Cum. Supp. 1992).

47. *Id.*

48. NEB. REV. STAT. § 36-669.18 (Reissue 1988).

49. NEB. REV. STAT. § 84-917(3)(Cum. Supp. 1992). The extent to which these appeals are utilized may depend on judges' willingness to grant temporary stays. *See infra* text accompanying notes 162-63.

50. LB 291 § 11(4); NEB. REV. STAT. § 39-669.16(4)(Cum. Supp. 1992).

tory when the new scheme took effect. In fact, however, the courts have blazed a trail for the hearing officers to follow. In substance, LB 291 represents more of a change in forum than a change of law. Many of the issues have already been addressed by the courts in criminal actions for driving while intoxicated, in court review of orders of the Department of Motor Vehicles, or in court review of agency decisions in general. The primary task of those litigating in the new administrative forum is to find the existing law and apply it to the case in question. With this task in mind, the following sections discuss those issues that are most likely to arise in ALR litigation and the legal tools available to deal with them.

### A. Constitutionality

The first issue to be considered is whether ALR is constitutional. Though it does not appear that a challenge to the statutes' constitutionality could be raised at the hearing level,<sup>51</sup> it is almost certain that the scheme will, at some point, face a constitutional challenge pursuant to a district court appeal. Many of the constitutional issues relating to drunk driving law have already been addressed by the courts and are not obviously affected by LB 291.<sup>52</sup> The expedited revocation process of ALR does raise new questions in the area of due process, however.

Early Nebraska case law took the position that driving was a State-

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51. The statutory scheme limits the issues which may be raised in the administrative hearing to whether there was probable cause for arrest, whether the arrest was lawful, whether the motorist was properly advised of the consequences of his or her actions, and whether there was an actual test failure or test refusal. LB 291 § 9(c); NEB. REV. STAT. § 39-669.15(6)(Cum. Supp. 1992).

52. See *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990)(holding that the drunk driving scheme does not violate the equal protection clause); *State v. Green*, 229 Neb. 493, 427 N.W.2d 304 (1988)(holding that *Miranda* warnings are not required prior to administering a chemical test and that such a test does not constitute self-incriminating testimony); *Clontz v. Jensen*, 227 Neb. 191, 416 N.W.2d 577 (1987)(holding that a motorist has no right to consult with an attorney prior to a chemical test); *Guerzon v. Jensen*, 225 Neb. 712, 407 N.W.2d 788 (1987)(holding that *Miranda* warnings are not required prior to a chemical test and that a motorist has no right to consult an attorney prior to a chemical test); *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987)(holding that evidence obtained in the implied consent context is not testimonial or communicative and does not fall within the privilege against self-incrimination); *Porter v. Jensen*, 223 Neb. 438, 390 N.W.2d 511 (1986)(holding that treating occupational drivers and pleasure drivers the same is not violative of equal protection); *State v. Howard*, 193 Neb. 45, 225 N.W.2d 391 (1975)(considering chemical tests in light of the Fourth Amendment); *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973)(holding that *Miranda* warnings and consultation with an attorney are not required prior to testing, and that chemical evidence does not fall under the privilege against self-incrimination).

granted privilege that did not warrant due process protection.<sup>53</sup> In *Bell v. Burson*,<sup>54</sup> however, the U.S. Supreme Court took exception to this view. The Court found that once driver's licenses are issued, their continued possession may become essential to the pursuit of a livelihood such that they represent a constitutionally protected property right. "In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."<sup>55</sup>

Since *Bell*, the Court has more precisely defined just what level of due process is required. In *Dixon v. Love*,<sup>56</sup> the Court considered the question of pre-hearing license deprivation where the motorist had numerous moving violations and had lost his license on "points." In finding that a hearing was not required prior to revocation, the Court adopted a three-factor balancing test.<sup>57</sup> Under this approach, the *Dixon* Court considered 1) the private interest that would be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used; and 3) the Government's interest, including the function involved and the administrative burden that additional procedures would entail.<sup>58</sup> Though the private interest was important, the Court found this interest to be outweighed by the low risk of erroneous deprivation and the "important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard."<sup>59</sup>

Two years later, the Court directly considered the constitutionality of a Massachusetts summary suspension statute in *Mackey v. Montrym*.<sup>60</sup> Applying the same three-part test, the Court found the Massachusetts scheme to be consistent with due process. The Court found the risk of erroneous deprivation to be low in light of the presumption that a law enforcement officer is a trained, experienced, and competent observer.<sup>61</sup> In addition, the Court gave great weight to the State's interest in preserving the safety of its public highways.<sup>62</sup> Since *Mackey*, the Supreme Court has not considered a due process challenge to ALR.<sup>63</sup>

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53. *Hadden v. Aitken*, 156 Neb. 215, 222, 55 N.W.2d 620, 623 (1952).

54. 402 U.S. 535 (1971).

55. *Id.* at 539.

56. 431 U.S. 105 (1977).

57. *Id.* at 112 (utilizing the three-factor test first articulated in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

58. *Id.* at 112-13.

59. *Id.* at 114 (citation omitted).

60. 443 U.S. 1 (1979).

61. *Id.* at 14.

62. *Id.* at 17-19.

63. For a more detailed analysis of the holdings in these cases, see John H. Reese, Summary Suspension of Driver Licenses of Drunken Drivers—Constitutional Dimensions, in NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DE-

Based on the above, it appears that the Nebraska version of ALR passes constitutional muster. Though the private interest in a driver's license is significant, LB 291 contains a provision to guard against erroneous deprivation. Unlike the Massachusetts scheme in *Mackey*, the Nebraska law provides the motorist with a thirty-day license. As such, there is no actual deprivation until the motorist has had an opportunity to be heard.<sup>64</sup> Furthermore, the State's compelling interest in preserving the safety of its highways weighs heavily in favor of constitutionality.

Additional support for this view is found in Nebraska case law. In considering an administrative revocation based on "points," the Nebraska Supreme Court looked to the district court appeal to satisfy due process. The court stated, "The due process requirements may under some circumstances be satisfied if full hearing in the courts is available after the administrative order with judicial power to stay irreparable injury pending court hearing."<sup>65</sup> Under this view, even if the administrative procedures are lacking, the Nebraska ALR scheme satisfies due process by providing the right to appeal the administrative order in district court.

## B. Tools of Litigation

As it appears that ALR falls within constitutional boundaries, the litigants in the administrative forum will be obliged to deal with the substantive and procedural aspects of ALR. An examination of this area of the law reveals that the Legislature has provided a number of tools to be used in litigating these issues.

As would be expected in a statutory scheme intended to continue the crack-down on drunk driving, the tools available to the State are formidable. From a procedural standpoint, LB 291 provides a tool for the State to avoid litigation entirely. If the motorist fails to file a petition for a hearing within ten days, the revocation cannot be challenged

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PARTMENT OF TRANSPORTATION, REDUCING HIGHWAY CRASHES THROUGH ADMINISTRATIVE LICENSE REVOCATION (1986). See also Larry A. Davis, *Developments in the Illinois Summary Suspension Law*, 79 ILL. B.J. 16 (1991).

64. Under certain circumstances, the motorist could actually be deprived of driving privileges for a few days. For instance, if the petition for a hearing is received by the Director on the tenth day after the arrest, the hearing need not be scheduled until twenty days later. After the hearing, the Director is given seven days to render a decision. In such a case, the total time between arrest and a final order could total thirty-seven days. Since the temporary driver's license expires on the thirtieth day, the motorist could actually be deprived of his or her license for a few days before the Director issues an order. A potential deprivation of a few days does not appear to alter the constitutional analysis, however.

65. *Stauffer v. Weedlun*, 188 Neb. 105, 113, 195 N.W.2d 218, 224 (1972)(citation omitted).

and will take effect automatically upon expiration of the motorist's temporary license.

In the event a hearing is requested, the primary tool available to the State results from legislative inaction. LB 291 does not alter the basic requirements for a conviction of driving while intoxicated. The substantive issues that may be raised under ALR are the same issues that have been litigated in the criminal process for years. As a result, there is a large body of Nebraska case law available to the litigants. Though the mere existence of such case law does not suggest an advantage to one party over the other, the courts in Nebraska have not looked favorably upon the drunken driver. As discussed more fully below,<sup>66</sup> the issues in question have been consistently decided in favor of the State.

Another tool results directly from legislative action. LB 291 includes a clear statement of purpose in which the Legislature pronounced that drunken drivers "present a hazard to the health and safety of all persons using the highways" requiring a clear commitment to "swift and certain revocation."<sup>67</sup> Armed with legislative intent, the State can argue persuasively that the statutes must be liberally construed in the interest of public health and safety.<sup>68</sup>

The motorist is left in a much less enviable position. That is not to say, however, that he or she is defenseless. The best defense, of course, is innocence. Even short of innocence, however, there is some room to avoid punishment.

Though it is not obvious from the face of the statute, the motorist retains an important tool. Under the APA, which sets forth the minimum administrative procedures for all agencies, the defendant has the right to request that the Department of Motor Vehicles be bound by the rules of evidence applicable in district court.<sup>69</sup> Invoking the rules of evidence makes much more arduous the State's task of establishing a *prima facie* case for revocation. The rules provide significant obsta-

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66. See *infra* text accompanying notes 74-147.

67. The purpose statement in LB 291 provides:

Because persons who drive while under the influence of alcohol present a hazard to the health and safety of all persons using the highways, a procedure is needed for the swift and certain revocation of the operator's license of any person who has shown himself or herself to be a health and safety hazard by driving with an excessive concentration of alcohol in his or her body and to deter others from driving while under the influence of alcohol.

LB 291 § 9(1); NEB. REV. STAT. § 39-669.15(1)(Cum. Supp. 1992).

68. See *Adkisson v. City of Columbus*, 214 Neb. 129, 133, 333 N.W.2d 661, 664 (1983) ("The obligation of the court in consideration and application of a statute is to determine and give effect to the purpose and intention of the Legislature. . . .") (quoting *Ledwith v. Bankers Life Ins.*, 156 Neb. 107, 115-16, 54 N.W.2d 409, 416 (1952)).

69. NEB. REV. STAT. § 84-914(1)(Reissue 1987).

cles to the admission of evidence which is damaging to the defendant. Chemical test results, for instance, may be found inadmissible if the State fails to establish, as foundation evidence, that the technician properly calibrated the testing device.<sup>70</sup>

Without the rules of evidence, the hearing operates under a considerably relaxed evidentiary standard. Under the APA, "evidence which possesses probative value commonly accepted by reasonably prudent persons" is admissible.<sup>71</sup> Such a standard allows the hearing officer to receive into evidence almost anything he or she finds to be relevant and reliable.<sup>72</sup>

Unfortunately for the licensee, the advantages of the rules of evidence do not come without a price. In order to bind the agency to the rules of evidence, the licensee must agree to pay the costs associated with conducting a formal evidentiary hearing, including court reporting services.<sup>73</sup> Other costs to the motorist are less obvious, but no less onerous. In order to take full advantage of the rules of evidence, it is necessary for the motorist to hire an attorney with some expertise in the area. In addition, if the motorist believes that there has been an error in the application of the rules of evidence, he or she may have to bear the cost of a district court appeal in order to fully realize the protection of the rules of evidence.

In sum, the available tools of litigation accurately reflect the Legislature's intent to provide "certain" punishment for drunk drivers. By preserving the applicability of existing case law and putting a price on the rules of evidence, the new statutory scheme makes it very difficult for the defendant to avoid revocation.

### C. Substantive Issues

The fundamental issue in administrative hearings under ALR is whether the motorist failed a properly administered chemical test or, in the case of refusal, whether the motorist refused to comply with a valid request to submit to a chemical test. To reach such a determination, a number of questions must first be answered. As a prerequisite to a valid request to submit to a chemical test, it must be established that the motorist was properly apprehended, that the motorist was actually operating a motor vehicle, that the officer had probable cause to arrest the defendant for driving while intoxicated, and that the motor-

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70. See *State v. Gerber*, 206 Neb. 75, 85-89, 291 N.W.2d 403, 409-11 (1980). It should be noted that in such a case, the inquiry is not whether the machine was actually calibrated, but whether the State introduced evidence of calibration as foundation evidence for the test results. See also *infra* text accompanying notes 113-26.

71. NEB. REV. STAT. § 84-914(1)(Reissue 1987).

72. See Steven L. Willborn, *A Time for Change: A Critical Analysis of the Nebraska Administrative Procedure Act*, 60 NEB. L. REV. 1, 21 n.140 (1981).

73. NEB. REV. STAT. § 84-914(1)(Reissue 1987).



ist was advised of the consequences of a chemical test.<sup>74</sup> If any link in this chain of events is missing, the request to submit to a chemical test is improper and the motorist's license cannot be revoked. If the chain of events is complete, then the fundamental issue of the motorist's failure or refusal can be addressed.

To deal with these issues, the litigants must simply look to the wealth of case law on the subject. The courts have considered each topic in some form. In fact, the law relating to many of the issues is practically settled. The state of each of these areas as reflected in Nebraska case law will be addressed in turn.

### *1. Operation or Actual Physical Control of Vehicle*

In order to establish that a motorist was driving while intoxicated, it is obviously necessary to prove that the motorist was actually driving a motor vehicle. In the terminology of the statute, it must be established that the motorist was "operating or in the actual physical control of a motor vehicle."<sup>75</sup> This inquiry is relevant to the administrative process on two levels. As an initial matter, actual physical control is relevant to the question of whether there is any violation of the statute. In addition, the inquiry is relevant to the question of whether the officer had valid grounds to request a chemical test.<sup>76</sup>

In most instances, it is obvious that the licensee was driving the vehicle and this question is easily resolved. In those instances where it is less clear, case law is available to provide guidance to the hearing officer. The test articulated by the courts turns on whether the motorist actually physically handled the controls of a motor vehicle while under the influence of alcohol.<sup>77</sup> As applied by the courts, the test is relatively easy to satisfy.

In *State v. Baker*,<sup>78</sup> for instance, the defendant was found to be operating a vehicle in violation of the statute for steering a vehicle while it was being towed. In this case, the officer saw the defendant behind the wheel while the vehicle was being pulled out of a ditch. The engine was running and the vehicle was in reverse, but was moved only a few feet under its own power in order to adjust the slack in the tow chain. Despite the fact that there was evidence to show that the de-

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74. See *Wisch v. Jensen*, 221 Neb. 609, 612, 379 N.W.2d 755, 757 (1986); *Fulmer v. Jensen*, 221 Neb. 582, 589, 379 N.W.2d 736, 741 (1986). These prerequisites roughly mirror the issues which may be raised in an administrative hearing under LB 291 § 9(6)(c); NEB. REV. STAT. § 39-669.15(6)(c)(Cum. Supp. 1992).

75. LB 291 § 9(6)(c); NEB. REV. STAT. § 39-669.15(6)(c)(Cum. Supp. 1992).

76. See *Emmons v. Jensen*, 221 Neb. 444, 447, 378 N.W.2d 147, 149 (1985)("[T]he arresting officer must have 'reasonable grounds' to believe that the licensee was either driving a motor vehicle or in actual physical control of same while under the influence of intoxicating liquor.") (citing NEB. REV. STAT. § 39-669.08).

77. *State v. Baker*, 236 Neb. 261, 264, 461 N.W.2d 251, 253 (1990).

78. *Id.*

fendant had not been driving when the vehicle went into the ditch, the court found that he physically handled the controls of a vehicle while under the influence in violation of the law.<sup>79</sup>

In addition, the courts have been more than willing to accept circumstantial evidence to establish that the defendant operated a vehicle. In *State v. Miller*,<sup>80</sup> a motorist came over a hill and struck a vehicle that was parked on the side of the road. The defendant was sitting in the parked vehicle and was found to be intoxicated. He claimed he was not the driver, stating that the driver ran off after the accident. The police never found the missing driver and the defendant was convicted of driving while intoxicated, though no one actually saw him drive.<sup>81</sup>

As such, there is settled law which can be pulled into the administrative forum to address this issue. Application of the courts' test leaves precious little room for a motorist found behind the wheel to prevail.

## 2. Investigative Stop

The case law concerning the propriety of an investigative stop is also relatively well-settled and largely defers to the judgment of the law enforcement officer. On its face, the test articulated by the courts appears relatively strict. The officer must have a "reasonable suspicion based on articulable facts" that a crime has been committed.<sup>82</sup> Put another way, the officer must have a "particularized and objective basis" for suspecting the motorist of criminal activity.<sup>83</sup>

The courts' application of this test is not restrictive, however, and grants considerable discretion to law enforcement. First of all, the officer's "reasonable suspicion" is to be considered in light of the "totality of the circumstances."<sup>84</sup> The "totality of the circumstances" includes all of the officer's objective observations "as well as the suspi-

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79. *Id.* at 265, 461 N.W.2d at 253. See also *State v. Dubany*, 184 Neb. 337, 167 N.W.2d 556 (1969)(finding that a motorist was "operating" the vehicle by spinning the tires, though the vehicle was stuck in a ditch); *Waite v. State*, 169 Neb. 113, 98 N.W.2d 688 (1959)(holding that a motorist found asleep behind the wheel of a running vehicle was "operating" the vehicle).

80. 226 Neb. 576, 412 N.W.2d 849 (1987).

81. *Id.* at 579-80, 412 N.W.2d at 851. See also *State v. Baker*, 224 Neb. 130, 395 N.W.2d 766 (1986)(holding that there was sufficient circumstantial evidence to establish operation of the vehicle where the motorist was found parked on side of the road, with the engine off and the keys in his pocket).

82. *State v. Pillard*, 235 Neb. 642, 646, 456 N.W.2d 755, 757 (1990)("The test to determine whether an investigative stop is justified is whether the police officer has a reasonable suspicion based on articulable facts which indicate that a crime has occurred, is occurring, or is about to occur and that the suspect may be involved.").

83. *Id.*

84. *Id.*

cion drawn by a trained and experienced police officer by inference and deduction. . . ."<sup>85</sup> In addition, the officer's suspicion need not be based solely on his own observations, but may utilize the collective knowledge of all officers involved.<sup>86</sup>

The discretion accorded law enforcement by these holdings is illustrated in *State v. Pillard*,<sup>87</sup> where an officer was outside a bar monitoring the vehicle of a man whose license was under suspension. Shortly after the officer ended his surveillance, another officer observed the vehicle on the highway and followed it. Though no driving violations were observed, the vehicle did pull off the road on two occasions to let the officer pass. On the advice of the first officer, the second officer stopped the vehicle. The vehicle's owner, whose license was under suspension, was only a passenger in the vehicle, but the driver was found to be intoxicated. Applying the above test, the court found the investigative stop to be proper.<sup>88</sup>

### 3. Probable Cause for Arrest

The issue of probable cause for arrest is more complicated and somewhat less settled than the issues discussed above. The minimum guidelines for this inquiry are provided by the Legislature. By statute, an officer may make a warrantless misdemeanor arrest if he or she,

has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested, (b) may cause injury to himself or herself or others or damage to property unless immediately arrested, (c) may destroy or conceal evidence of the commission of such misdemeanor, or (d) has committed a misdemeanor in the presence of the officer.<sup>89</sup>

Since driving while intoxicated is a misdemeanor, one of the conditions set forth above must be present in order to make a valid warrantless arrest.<sup>90</sup> The presence of one of these conditions is normally not difficult to establish. It is a common circumstance that the intoxicated person constitutes a danger to himself or others or property such that an arrest is proper under subsection (b). Also, it is common that a misdemeanor has been committed in the presence of the officer so that an arrest is proper under subsection (d). Even if these are not present, it has been held that the natural metabolic processes of the body tend to destroy evidence of intoxication so that immediate arrest

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85. *Id.*

86. *Id.*

87. 235 Neb. 642, 456 N.W.2d 755 (1990).

88. *Id.* at 647, 456 N.W.2d at 759. In a more common factual setting, the courts have routinely held that an officer who observes a vehicle weaving may properly make an investigative stop. *State v. Beerbohm*, 229 Neb. 439, 427 N.W.2d 75 (1988); *State v. Dail*, 228 Neb. 653, 424 N.W.2d 99 (1988); *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987); *State v. Daniels*, 220 Neb. 480, 370 N.W.2d 179 (1985).

89. NEB. REV. STAT. § 29-404.02 (Reissue 1989).

90. *State v. Marcotte*, 233 Neb. 533, 538, 446 N.W.2d 228, 232 (1989).

under subsection (c) is proper.<sup>91</sup>

Building on these minimum requirements, the courts have formulated a more specific inquiry. The general rule concerning probable cause for arrest as articulated by the supreme court can be found in *State v. Twohig*.<sup>92</sup> In this case, the court stated: "When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant."<sup>93</sup>

In a somewhat different approach, the court has also backed into a finding of probable cause. In the context of a criminal prosecution for drunk driving, the court has held, "Either a law enforcement officer's observations of a defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests constitutes sufficient evidence to sustain a conviction of driving while under the influence of alcoholic beverages."<sup>94</sup> If such officer observations are sufficient to support a conviction for driving under the influence, it is clear that they satisfy the "lesser standard" of reasonable grounds for arrest.<sup>95</sup>

In what is becoming a familiar theme, the court's application of these rules is considerably less restrictive than the rules themselves suggest. First of all, it is provided by statute that the officer may take into account the totality of circumstances, including any expert knowledge or experience possessed by the officer.<sup>96</sup>

Furthermore, it has been held that the existence of probable cause is not based on the knowledge of a single officer, but on the "collective information possessed by all the officers engaged in a common investi-

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91. *State v. Wegener*, 239 Neb. 946, 951, 479 N.W.2d 783, 787 (1992); *State v. Marcotte*, 233 Neb. 533, 539, 446 N.W.2d 228, 233 (1989).

92. 238 Neb. 92, 469 N.W.2d 344 (1991).

93. *Id.* at 106, 469 N.W.2d at 354 (quoting *State v. Blakely*, 227 Neb. 816, 821, 420 N.W.2d 300, 304 (1988)). The court has held similarly in numerous cases. *E.g.*, *State v. Grantzinger*, 235 Neb. 974, 979, 458 N.W.2d 461, 465 (1990); *State v. Marcotte*, 233 Neb. 533, 538, 446 N.W.2d 228, 232 (1989); *State v. Bishop*, 224 Neb. 522, 525, 399 N.W.2d 271, 275 (1987); *State v. Klingelhofer*, 222 Neb. 219, 222-23, 382 N.W.2d 366, 369 (1986).

94. *State v. Lichti*, 219 Neb. 894, 897, 367 N.W.2d 138, 141 (1985).

95. *Wisch v. Jensen*, 221 Neb. 609, 612, 379 N.W.2d 755, 757 (1986).

96. NEB. REV. STAT. § 29-404.03 (Reissue 1989) provides:

In determining whether reasonable cause exists to justify an arrest, a law enforcement officer may take into account all facts and circumstances, including those based upon any expert knowledge or experience which the officer in fact possessed, which a prudent officer would judge relevant to the likelihood that a crime has been committed and that the person to be arrested has committed it, and for such purpose the officer may rely on information he receives from any informant whom it is reasonable under the circumstances to credit, whether or not at the time of making the arrest the officer knows the informant's identity.

gation.”<sup>97</sup> Under this “collective knowledge doctrine,” an officer who does not have personal knowledge of any of the facts establishing probable cause for the arrest may nevertheless make the arrest if he or she is merely carrying out the directions of another officer who does have probable cause.<sup>98</sup>

Even less restrictive is the rather complicated assertion that probable cause has an independent existence. In *State v. Sassen*,<sup>99</sup> the court found that the validity of an arrest was premised on the existence of probable cause, not on the officer’s knowledge that probable cause existed.<sup>100</sup> The court cited with approval a Ninth Circuit case where the court found that the issue of probable cause was not foreclosed by the officer’s testimony that she did not believe she had probable cause to make the arrest.<sup>101</sup> Such an approach appears to give the court the ability to “find” probable cause even when the officer did not.

The only significant limitation placed on the officer’s right to make an arrest is a geographic one. In *State v. Tingle*,<sup>102</sup> the court held that an officer cannot make a valid arrest for a misdemeanor outside of his geographical jurisdiction. The court found no statutes that authorized a misdemeanor arrest outside the officer’s jurisdiction and held that the common law powers of an officer to make a “fresh pursuit” arrest were limited to felonies.<sup>103</sup>

In sum, establishing probable cause for arrest is not as significant an obstacle to the State as it may initially appear. As applied by the courts, the probable cause inquiry will disallow only the most irregular arrests.

#### 4. *Advisement of Consequences*

The final prerequisite to a valid request to submit to a chemical test is a proper advisement. LB 291 specifically requires that the motorist be advised as to the consequences of refusing to submit to a chemical test and the consequences of failing a chemical test.<sup>104</sup> This requirement is not entirely new. The previous statutory scheme required the officer to advise the motorist of the consequences of re-

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97. *State v. Wegener* 239 Neb. 946, 949, 479 N.W.2d 783, 786 (1992).

98. *Id.* at 949, 479 N.W.2d at 786.

99. 240 Neb. 773, 484 N.W.2d 469 (1992).

100. *Id.* at 777, 484 N.W.2d at 472 (citing *State v. Roach*, 234 Neb. 620, 626, 452 N.W.2d 262, 267 (1990)).

101. *State v. Sassen*, 240 Neb. 773, 777, 484 N.W.2d 469, 472 (1992) (citing *United States v. Moses*, 796 F.2d 281 (9th Cir. 1986)).

102. 239 Neb. 558, 477 N.W.2d 544 (1991).

103. *Id.* at 562, 477 N.W.2d at 547. See also *State v. Masat*, 239 Neb. 849, 479 N.W.2d 131 (1992).

104. LB 291 § 5(9); NEB. REV. STAT. § 39-669.08(10) (Cum. Supp. 1992).

fusal.<sup>105</sup> As such, there is significant case law available to assist the hearing officer in determining whether a motorist has been adequately advised.

Initially, it should be noted that the advisement referred to in this section does not encompass *Miranda* warnings or trigger the right to an attorney. The courts have consistently held that *Miranda* warnings are not required prior to a request to submit to a chemical test.<sup>106</sup> In addition, administrative revocation has been characterized as remedial, rather than punitive, so that the right to an attorney does not attach.<sup>107</sup>

Instead, the advisement serves a much simpler purpose. It is intended to ensure that the motorist knows and is in a position to make a rational and voluntary decision as to whether he or she will comply with the law.<sup>108</sup> Although simple in theory, there is an obvious obstacle to the orderly application of this noble concept. In the real world it is very difficult to ensure that an intoxicated person is in a position to make a "rational" decision concerning a chemical test. As a result, the courts have focused primarily on whether the officer read the prescribed advisement form and require only minimal understanding by the defendant.

The limited role of the advisement is summarized in the following oft-quoted passage: "The only understanding required by the licensee is that he has been asked to take a test. It is not a defense that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take."<sup>109</sup> Under this standard, it is very difficult to establish that the motorist was not properly advised. Even where the officer misread the penalties for refusal, the court found the motorist's understanding to be adequate.<sup>110</sup> In fact, only two cases could be located in which the court recognized a lack of understanding on the part of the defendant. In *Martinez v. Peterson*,<sup>111</sup> the court found that the motorist's refusal was justifiable because he did not speak English and could not under-

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105. NEB. REV. STAT. § 39-669.08(9)(Cum. Supp. 1990)(amended 1992).

106. *Fulmer v. Jensen*, 221 Neb. 582, 587, 379 N.W.2d 736, 740 (1986). In fact, giving the *Miranda* warnings may be improper if they are mingled with the implied consent advisement. See *Wiseman v. Sullivan*, 190 Neb. 724, 729, 211 N.W.2d 906, 910 (1973).

107. *Bapat v. Jensen*, 220 Neb. 763, 765, 371 N.W.2d 742, 745 (1985).

108. *State v. Deets*, 234 Neb. 307, 308, 450 N.W.2d 696, 697 (1990).

109. *E.g.*, *State v. Green*, 238 Neb. 328, 343-44, 470 N.W.2d 736, 749 (1991)(quoting *Clontz v. Jensen*, 227 Neb. 191, 196, 416 N.W.2d 577, 580 (1987)); *Pollard v. Jensen*, 222 Neb. 521, 523, 384 N.W.2d 640, 641-42 (1986)(citation omitted).

110. *State v. Deets*, 234 Neb. 307, 308, 450 N.W.2d 696, 697 (1990). The court did recognize that it would be improper for the officer to intimidate the motorist into taking the test by representing that the penalty for refusal is much greater than it actually is. *Id.* at 308-09, 450 N.W.2d at 697.

111. 212 Neb. 168, 322 N.W.2d 386 (1982).

stand what he was being asked to do. Likewise, in *Wiseman v. Sullivan*,<sup>112</sup> the court found the motorist's refusal to be justifiable because the officer had co-mingled the *Miranda* warnings and the implied consent warnings to the point that the motorist justifiably believed he had the right to consult an attorney before submitting to a blood test.

### 5. Chemical Test Results - Establishing Failure

If all of the above prerequisites to a valid request to submit to a chemical test are established, then the litigants may address the fundamental issue of whether the motorist actually refused or failed a chemical test.<sup>113</sup> If a test has actually been administered, then the inquiry is whether the test accurately indicates an alcohol concentration in excess of statutory limits.<sup>114</sup>

Two avenues are available to the motorist to attack the chemical test results. First, the licensee may try to keep the test results from being admitted into evidence. If successful, the license of the motorist cannot be administratively revoked. Even if there is other evidence that the motorist was intoxicated, such evidence is not relevant at this point in the administrative hearing. Only failure of a chemical test or refusal can trigger administrative action. If the test results are admitted into evidence, the defendant can challenge the reliability of the particular test based on some irregularity in the circumstances. This approach is much less effective, however, as it may be difficult for the fact finder to ignore such "scientific" results.

The admissibility of chemical test results in an administrative forum was not an issue before the passage of LB 291. Under the previous statutory scheme, there was no need to consider this question because the administrative revocation process was triggered only when a motorist refused to submit to a chemical test.<sup>115</sup> As a result, though the law concerning the admissibility of chemical tests in a criminal prosecution has been litigated extensively, the requirements for admissibility in an administrative hearing are not clear.

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112. 190 Neb. 724, 729, 211 N.W.2d 906, 910 (1973).

113. It should be noted that a preliminary breath test is not a "chemical test" which triggers the administrative revocation process. The preliminary breath test takes place before the motorist is arrested and is used to establish probable cause for arrest. See *State v. Green*, 217 Neb. 70, 73-74, 348 N.W.2d 429, 431-32 (1984).

114. By statute, it is unlawful for a person to operate a motor vehicle,

(b) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or

(c) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.

LB 291 § 4(1); NEB. REV. STAT. § 39-669-07(1)(Cum. Supp. 1992).

115. NEB. REV. STAT. § 39-669.15 (Reissue 1988)(amended 1992).

In criminal prosecutions, the basic requirements for admissibility are prescribed by statute. The Legislature has provided that, in order to be valid, chemical tests are to be performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by the Department for such a purpose.<sup>116</sup> These requirements work both for and against the motorist. On the one hand, the statute sets forth minimum requirements for admissibility which the motorist can utilize to oppose admission of the test results. On the other hand, the statute provides that tests performed in accordance with this section "shall be competent evidence," effectively foreclosing a challenge to the adequacy of the established procedures.<sup>117</sup>

Under the rules of evidence, which are always in force in a criminal proceeding, the courts have applied an additional set of admissibility requirements which largely parallel the above statutory requirements. In such an instance, the State must lay a fairly detailed foundation before the test results may be admitted. In regard to breath test results, the State must satisfy four foundational elements: 1) that the testing device was properly working at the time of testing; 2) that the person administering the test was qualified and held a valid permit; 3) that the test was properly conducted under the methods stated by the Department of Health; and 4) that all other statutes were satisfied.<sup>118</sup> Foundation evidence to this effect is also required to admit the results of blood tests.<sup>119</sup>

The courts have been relatively strict in the application of the above requirements. To lay the proper foundation, the State must

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116. LB 291 § 6; NEB. REV. STAT. § 39-669.11 (Cum. Supp. 1992) provides:

Any test made under section 39-669.08, if made in conformity with the requirements of this section, shall be competent evidence in any prosecution under a state statute or city or village ordinance involving operating a motor vehicle while under the influence of alcoholic liquor or drugs or involving driving or being in actual physical control of a motor vehicle when the concentration of alcohol in the blood or breath is in excess of allowable levels.

To be considered valid, tests of blood, breath, or urine made under section 39-669.08 shall be performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose . . .

117. *See* State v. Tatara, 230 Neb. 279, 282, 430 N.W.2d 692, 695 (1988)(citing Neb. Rev. Stat. § 39-669.11 and holding that test results obtained in conformance with § 39-669.11 are admissible). *See also* State v. Kudlacek, 229 Neb. 297, 300-01; 426 N.W.2d 289, 292 (1988)(holding that the motorist may not challenge the accuracy of devices used to calibrate the testing devices as "[s]uch a chain of evidence might have to proceed ad infinitum.").

118. State v. Bullock, 223 Neb. 182, 183-84, 388 N.W.2d 505, 507 (1986); State v. Gerber, 206 Neb. 75, 90-91, 291 N.W.2d 403, 411-12 (1980). *See also* State v. Obermeier, 241 Neb. 802, 490 N.W.2d 693 (1992)(holding that actual copy of testing permit need not be introduced).

119. State v. Brittain, 212 Neb. 686, 690-92, 325 N.W.2d 141, 146 (1982).



provide specific evidence that the testing device was in proper working order such as a maintenance and/or calibration log. Specific evidence, including a Department of Health permit, is also required to establish that the person administering the test is qualified. Furthermore, it appears to be necessary for the State to offer in evidence the Department of Health rules and regulations and offer specific evidence of compliance with the methods prescribed in those rules.<sup>120</sup> A deficiency in any one of these areas may render the test results inadmissible under the rules of evidence.

As discussed above, it is not at all clear how or even if these rules apply in an administrative setting. The rules and regulations promulgated by the Department of Motor Vehicles do not directly address this issue. The regulations provide that receipt of the officer's sworn report is sufficient to establish a *prima facie* case for the Department.<sup>121</sup> In addition, when the rules of evidence have not been invoked, the regulations direct the hearing officer to admit evidence which possesses probative value "in any form commonly accepted by reasonably prudent persons in the conduct of their affairs."<sup>122</sup> Based on these provisions, it appears that the regulations allow the Department to establish a *prima facie* case for revocation simply by including the test results in the sworn report, provided a "reasonably prudent" person would accept the test results in such a form.

A more detailed evidentiary showing may be required by statute, however. Section 39-669.11 provides that chemical tests must be performed according to methods approved by the Department of Health in order "[t]o be considered valid."<sup>123</sup> This language arguably compels the State to make some showing of compliance with these methods in order for the test results to be admitted. Resolution of the question depends primarily on whether a reasonably prudent person would accept chemical test results where there has been no showing of compliance with the statutory validity requirements.

In response to the above, it may be argued that § 39-669.11 applies only to "prosecution[s] under a state statute," which may not include an administrative appeal.<sup>124</sup> Though this argument is persuasive, it does not settle the question. There is at least room for argument that the "prosecution" limitation applies only to the first paragraph of the

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120. *State v. Dail*, 228 Neb. 653, 661, 424 N.W.2d 99, 105 (1988); *State v. Bullock*, 223 Neb. 182, 183-84, 388 N.W.2d 505, 507 (1986); *State v. Green*, 217 Neb. 70, 73-74, 348 N.W.2d 429, 431-32 (1984); *State v. Dush*, 214 Neb. 51, 54, 332 N.W.2d 679, 681-82 (1983); *State v. Gerber*, 206 Neb. 75, 90-91, 291 N.W.2d 403, 411-12 (1980).

121. 247 NEB. ADMIN. R. & REGS. Chap. 1, § 6.05B (1993) (Dept. of Motor Vehicles).

122. *Id.* § 19.01. This evidentiary standard matches that contained in the Administrative Procedure Act. NEB. REV. STAT. § 84-914(1) (Reissue 1987).

123. LB 291 § 6; NEB. REV. STAT. § 36-669.11 (Cum. Supp. 1992). The relevant portions of the statute are reproduced above. *See supra* note 116.

124. *Id.*

statute. Arguably, the validity language in the second paragraph of the statute has application beyond criminal prosecutions to provide minimum standards for all chemical tests performed pursuant to § 39-669.08.

If the rules of evidence are in force, the question of the applicability of § 39-669.11 is of less importance. In such a case, the hearing officer must look to the relatively strict foundational requirements that have been applied by the courts in criminal prosecutions.<sup>125</sup> These requirements would appear to have equal force in an administrative setting and, as discussed above, necessitate a detailed evidentiary showing in order to establish a *prima facie* case for revocation.<sup>126</sup>

If a challenge to the admissibility of the test results fails, the motorist's remaining option is to attack the reliability of the test results in an attempt to sway the finder of fact.<sup>127</sup> Though there are countless methods to attack reliability, a few of the most obvious techniques merit discussion.

The most straightforward method to challenge the test results is to introduce independent test results. By statute, the motorist has the right to an independent chemical test performed by a physician of his or her choice.<sup>128</sup> In addition, the physician may evaluate the motorist's condition and perform any laboratory tests deemed appropriate.<sup>129</sup> By taking advantage of this right, the motorist may be able to refute the test results or at least gather evidence as to a physical condition that could affect the test.<sup>130</sup> Many motorists are not aware of this provision, however, and law enforcement officers are *not* required to advise them of this right.<sup>131</sup> In addition, time is the enemy of the mo-

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125. See *supra* text accompanying notes 118-19.

126. *Id.*

127. Though the basic requirements for admissibility are provided by statute, the courts have held that it is beyond the power of the Legislature to prescribe that certain evidence is conclusive and binding on the courts. *State v. Burling*, 224 Neb. 725, 730, 400 N.W.2d 872, 876 (1987).

128. NEB. REV. STAT. § 39-669.09 (Cum. Supp. 1992) provides:

The person tested shall be permitted to have a physician of his or her choice evaluate his or her condition and perform or have performed whatever laboratory tests he or she deems appropriate in addition to and following the test or tests administered at the direction of the law enforcement officer. If the officer refuses to permit such additional test to be taken, then the original test or tests shall not be competent as evidence. Upon the request of the person tested, the results of the test or tests taken at the direction of the law enforcement officer shall be made available to him or her.

129. *Id.*

130. Though the courts have not dealt specifically with the issue, it appears that a motorist's independent test results would have to comply with the same admissibility requirements as the official chemical test results.

131. *State v. Klingelhofer*, 222 Neb. 219, 225, 382 N.W.2d 366, 370 (1986); *State v. Miller*, 213 Neb. 274, 276, 328 N.W.2d 769, 771 (1983).

torist in this situation. If the independent tests are not conducted very soon after the official tests, they lack probative value as to the motorist's condition while he or she was driving.

The element of time raises another area in which the official test results can be challenged. Recognizing the link between testing delay and the probative value of the results, the courts have held that the chemical test must be given within a "reasonable time" after the motorist was apprehended.<sup>132</sup> Given the fact that a delay in time may actually work in the defendant's favor, however, a delay of up to an hour has been rather routinely allowed.<sup>133</sup>

Another approach that has been used with some success is to attack the testing device or procedure to establish a margin of error. In *State v. Burling*,<sup>134</sup> the defendant offered expert testimony that the distribution of alcohol in the breath varies from person to person so that the standard ratio used by the machine was subject to a margin of error. The court held that a test subject to a margin of error must be adjusted so as to give the defendant the benefit of the doubt.<sup>135</sup> The court has limited the holding in *Burling*, however, stating that a margin of error cannot exist as a matter of law, but must be established in each case independently of prior cases.<sup>136</sup>

### 6. *Actions Constituting Refusal*

If it has been established that there was a valid request to submit to a chemical test, but the motorist did not actually submit to the test, the final inquiry is whether the actions of the motorist constituted a refusal within the meaning of the statute. This is not a new issue in the administrative forum as an operator's license could be administratively revoked for refusal under the previous statutory scheme. As a result, there has been a substantial amount of litigation in Nebraska concerning the question of just what actions and/or responses by a motorist constitute a refusal to submit to a chemical test. The issue has been considered in the context of administrative license revocation proceedings and in regard to criminal charges for refusal.<sup>137</sup>

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132. *State v. Kubik*, 235 Neb. 612, 634, 456 N.W.2d 487, 501 (1990).

133. *Id.*

134. 224 Neb. 725, 400 N.W.2d 872 (1987).

135. *Id.* at 730, 400 N.W.2d at 876. See also *State v. Hvistendahl*, 225 Neb. 315, 318, 405 N.W.2d 273, 276 (1987).

136. *State v. Babcock*, 227 Neb. 649, 653, 419 N.W.2d 527, 530 (1988).

137. As noted earlier, a preliminary breath test is not a chemical test subject to administrative revocation procedures. See *supra*, note 113. This distinction is also relevant in the area of refusal. Refusal to submit to a preliminary breath test is a separate offense from refusal to submit to a chemical test and occurs before, rather than after, arrest. Under LB 291, a person who refuses to submit to a preliminary breath test is guilty of a Class V misdemeanor and may be placed under arrest. LB 291 § 5(3), NEB. REV. STAT. § 39-669.08(3)(Cum. Supp. 1992). If,

Though its application is sometimes difficult, the law concerning refusals is well settled. One passage in particular is quoted by the Nebraska Supreme Court in almost every case of this type. The court states:

A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was being asked to submit to a test and manifested an unwillingness to take it.<sup>138</sup>

As has been shown to be common in this area of the law, the courts' application of this "objective" test tends to favor the State. First of all, the courts have emphasized that the above standard is based on a reasonable officer's perception of the situation. This focus on the perception of the officer seemingly applies without regard to the actual condition of the motorist. In *Wohlgemuth v. Pearson*,<sup>139</sup> the court considered whether a motorist who had been in an accident and suffered a concussion was capable of refusal. In fact, there was evidence that the motorist was not entirely coherent after the accident. The court deferred to the officer's perception and found a refusal, however, finding that "any other result would force the director and the trial court into a psychological guessing game as to the appellee's state of mind and his degree of capability of comprehension."<sup>140</sup>

In addition, the courts have not tolerated any type of conditional response by the motorist. "Anything less than an unqualified, unequivocal assent to an officer's request to submit to a chemical test constitutes a refusal."<sup>141</sup> Under this approach, the motorist may not condition submission to a test on consultation with an attorney<sup>142</sup> or refuse based on concerns about the effect that medication or subsequent alcohol ingestion may have on the test.<sup>143</sup> Furthermore, the motorist is allowed only one chance to consent. A motorist who refuses, then changes his or her mind and consents, has still refused under the statute and the officer need not administer the test.<sup>144</sup>

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at that point, there is other evidence to support the officer's suspicion, the defendant may be arrested for driving under the influence and asked to submit to an actual chemical test.

138. *E.g.*, *State v. Green*, 238 Neb. 328, 343, 470 N.W.2d 736, 749 (1991); *State v. Clark*, 229 Neb. 103, 108, 425 N.W.2d 347, 351 (1988); *Clontz v. Jensen*, 227 Neb. 191, 196, 416 N.W.2d 577, 580 (1987).

139. 204 Neb. 687, 285 N.W.2d 102 (1979),

140. *Id.* at 691, 285 N.W.2d at 104. *See also* *Jensen v. Jensen*, 222 Neb. 23, 382 N.W.2d 9 (1986) (deferring to the finder of fact when considering conflicting evidence as to the motorist's coherency).

141. *E.g.*, *Clontz v. Jensen*, 227 Neb. 191, 195, 416 N.W.2d 577, 580 (1987).

142. *Id.* at 195, 416 N.W.2d 580.

143. *Bapat v. Jensen*, 220 Neb. 763, 765, 371 N.W.2d 742, 745 (1985); *Rudat v. Pearson*, 202 Neb. 331, 333-34, 275 N.W.2d 279, 280-81 (1979).

144. *Hoyle v. Peterson*, 216 Neb. 253, 256, 343 N.W.2d 730, 733 (1984) ("In a driver's course through the implied consent law, there comes a 'point of no return.' After

Even where the motorist has claimed to be physically unable to complete the test, the courts have been reluctant to exonerate the licensee. While recognizing that a true physical disability may excuse conduct that would otherwise be treated as a refusal, the courts have narrowly interpreted this exception.<sup>145</sup>

The court has also recognized the general idea of a "justifiable refusal," but has likewise interpreted the exception narrowly. "Justifiable refusal of the test depends upon some illegal or unreasonable aspect in the nature of the request, the test itself, or both."<sup>146</sup> Such a general statement has the potential for liberal application, but the courts have been reluctant to find that a refusal was justifiable. In fact, they have so held in only two cases where it was very clear that the defendant's actions were reasonable under the circumstances.<sup>147</sup>

As such, each of the substantive issues which may be raised in an administrative hearing under LB 291 has already been addressed by the courts to some degree. In light of the fact that the case law in this area tends to favor the State, it will be difficult for an intoxicated motorist to avoid revocation by arguing a substantive issue.

#### D. Procedural Issues

As would be expected with any new statutory scheme of administrative adjudication, there are a myriad of unanswered questions concerning the specific procedures that will be followed under ALR. Some of these questions were answered when the Department of Motor Vehicles promulgated the rules and regulations that govern the process.<sup>148</sup> Other questions will not be answered until the system has been in place for some time. Though it would be impossible to anticipate and discuss all of these issues, there are a few major topics that warrant discussion.

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a reasonable opportunity to make a decision has been afforded a motorist, a decision simply has to be made." ). But see *Sedlacek v. Pearson*, 204 Neb. 625, 628, 284 N.W.2d 556, 557-58 (1979) (holding that a motorist who refuses and then changes his mind may not be cited for refusal if a chemical test was actually administered).

145. *State v. Clark*, 229 Neb. 103, 109, 425 N.W.2d 347, 351-52 (1988).

146. *Hoyle v. Peterson*, 216 Neb. 253, 256, 343 N.W.2d 730, 733 (1984).

147. *Martinez v. Peterson*, 212 Neb. 168, 322 N.W.2d 386 (1982) (holding that the motorist's refusal was justifiable because he did not speak English and could not understand what he was being asked to do); *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973) (holding that the motorist's refusal was justifiable because the officer had co-mingled the *Miranda* warnings and the implied consent warnings to the point that the motorist justifiably believed he had the right to an attorney before submitting to a blood test).

148. Rules and regulations were approved in their final form and filed with the Secretary of State on February 24, 1993. 247 NEB. ADMIN. R. & REGS. Chap. 1 (1993) (Dept. of Motor Vehicles).

### 1. *Burden of Proof*

Probably the most important procedural issue is the question of who must bear the burden of proof in the administrative hearing. Must the State establish that a revocation order is proper, or must the motorist establish that the proposed order is improper? The language of the statute does not directly address the issue. The Department of Motor Vehicles has adopted the position that the burden of proof is on the motorist to show by a preponderance of the evidence why his or her license should not be revoked.<sup>149</sup> The State, however, must establish a prima facie case for revocation by offering the officer's sworn report.<sup>150</sup>

This approach appears to be in accord with the case law on the subject. In *Mackey v. Dept. of Motor Vehicles*,<sup>151</sup> the court considered the burden of proof in a refusal hearing. The court stated:

[S]ection 39-669.15, R.R.S. 1943, by prescribing the contents of the affidavit which the arresting officer must file with the Director of Motor Vehicles after a person refuses to submit to a sobriety test, places the burden upon the State to make a prima facie case for revocation before the Director.<sup>152</sup>

As amended by LB 291, section 39-669.15 still prescribes the contents of the sworn report which is to be forwarded to the Director of the Department of Motor Vehicles.<sup>153</sup> As such, it appears that this section can also be interpreted to place the burden of a prima facie showing on the State.

The remaining question is whether the State may actually establish its prima facie case simply by offering the officer's sworn report. Where the rules of evidence have been invoked, it is relatively clear that the State must do more. Competent evidence must be offered to establish the prerequisites to a valid request to submit to a chemical test and to establish refusal or failure of the test.<sup>154</sup> In fact, the regulations anticipate such a result by placing the burden of going forward on the Department in hearings under the formal rules of evidence.<sup>155</sup> Even where the rules of evidence are not requested, however, there is some question as to whether the sworn report alone is sufficient to establish the prima facie case.<sup>156</sup>

### 2. *Officer Actions*

The critical role played by law enforcement officers in the imple-

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149. 247 NEB. ADMIN. R. & REGS. Chap. 1, § 6 (1993)(Dept. of Motor Vehicles).

150. *Id.*

151. 194 Neb. 707, 235 N.W.2d 394 (1975).

152. *Id.* at 712, 235 N.W.2d at 397.

153. LB 291 § 9(2)-(3); NEB. REV. STAT. § 39-669.15(2)-(3)(Cum. Supp. 1992).

154. See *supra* text accompanying notes 74-147.

155. 247 NEB. ADMIN. R. & REGS. Chap. 1, § 15.02A (1993)(Dept. of Motor Vehicles).

156. See *supra* text accompanying notes 121-24.

mentation of ALR also raises a number of procedural issues. Though there are many questions, clear answers will not be available until the ALR system has been in place for some time. Nonetheless, it is useful to at least raise two main questions at this point in time.

The first issue involves the officer's involvement at the time of the arrest. In short, how far can the officer deviate from the statutory requirements? For instance, after seizing the motorist's license, the officer is to forward a sworn report to the Director.<sup>157</sup> What if the sworn report is incomplete? May the defect be cured by officer testimony at the hearing or is an order based on a defective report void? Furthermore, what are the requirements for establishing that the report is "sworn"? In resolving these questions, the Department of Motor Vehicles and the courts must seek to achieve the purpose of the statutes while maintaining the scheme's somewhat tenuous hold on due process.

The second major issue involves the officer's involvement in the administrative hearing. Though the officer must appear at the hearing,<sup>158</sup> it is not clear how much latitude the officer will be allowed in giving his or her testimony. Particularly where the rules of evidence are in force, difficult questions arise as to the propriety of the officer's testimony. For instance, if the arresting officer did not actually administer the chemical test, may he or she testify concerning the administration of the test, or must the technician be called to testify? If it is necessary to call the technician as a witness, the burden ALR places on law enforcement resources increases dramatically. Resolution of such relatively obscure issues will have a significant impact on the overall efficiency of ALR in Nebraska.

### 3. *Appeal in District Court*

#### a. *Perfecting the Appeal*

Pursuant to the provisions of the APA, persons "aggrieved" by a revocation order of the Director may appeal in district court. In general, there is nothing unusual about the procedure for perfecting the appeal. In the area of service, however, there is one major trap for the unwary.

Under the APA,<sup>159</sup> summons is to be served in the manner provided for service of summons in a civil case. The potential trap lies in the manner in which a state agency is properly served. By statute, the State of Nebraska, any state agency or any employee of the State sued in an official capacity may be served by leaving the summons at the Office of the Attorney General with the Attorney General, Deputy

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157. LB 291 § 9(2)-(3); NEB. REV. STAT. § 39-669.15(2)-(3)(Cum. Supp. 1992).

158. 247 NEB. ADMIN. R. & REGS. Chap. 1, § 17.02 (1993)(Dept. of Motor Vehicles).

159. NEB. REV. STAT. § 84-917(2)(a)(Cum. Supp. 1992).

Attorney General or someone designated in writing by the Attorney General.<sup>160</sup>

If a party aggrieved by an order of the Director of the Department of Motor Vehicles files an appeal in district court, but serves the Department of Motor Vehicles rather than the Office of the Attorney General, the jurisdiction of the district court may be subject to challenge. The argument that the court lacks jurisdiction is based on Neb. Const. art. V, § 22. The section provides: "[T]he State may sue and be sued, and the Legislature shall provide by law in what manner and in what court suits shall be brought." Based on this language, it is arguable that the *only* proper method for service on the State is a method provided by statute.

Continuing this argument, the only statutory method for service on the State is that contained in § 25-510.02 which provides for service upon the Attorney General. Support for this view is found in *Beatrice Manor, Inc. v. Department of Health*,<sup>161</sup> where the court noted that § 25-510.02 made service on the Attorney General a requirement for all cases involving the State. As such, there is a persuasive argument that service must be made upon the Attorney General. Though it is not clear if the courts will universally accept this argument, by far the safest path for the motorist is to serve both the Department of Motor Vehicles and the Attorney General.

#### *b. Temporary Stay of Revocation Order*

Under the provisions of the APA,<sup>162</sup> the motorist may request that the Department of Motor Vehicles stay the revocation order pending the district court's ruling. If the Department of Motor Vehicles refuses to do so, such a temporary stay may also be requested from the court. The court may not grant such relief unless it finds that *all* of the following criteria are met: 1) the motorist is likely to prevail in the action; 2) the motorist will suffer irreparable injuries if a stay is not granted; 3) the grant of a stay will not substantially harm other parties to the proceedings; and 4) the threat to public health relied upon by the Department is not sufficiently serious to justify the Department's denial of a temporary stay.<sup>163</sup>

Though these criteria appear to be rigorous, they have not been so applied by the courts. In the context of judicial review of refusal hearings, temporary stays have been issued by the courts almost as a matter of course. The ready availability of the temporary stay makes the district court appeal a more attractive option. A motorist who cannot

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160. NEB. REV. STAT. § 25-510.02 (Reissue 1989).

161. 219 Neb. 141, 144, 362 N.W.2d 45, 49 (1985).

162. NEB. REV. STAT. § 84-917(3)(Cum. Supp. 1992).

163. *Id.*



decide whether or not to appeal may be swayed in favor of appeal if the loss of his or her license will thereby be postponed.

In fact, the manner in which the courts handle temporary stays could have a huge impact on the overall effectiveness of ALR. If temporary stays are awarded as a matter of course, the courts may be flooded with appeals and the efficiency of ALR will break down to some degree. If the courts become stingier with temporary stays, motorists may be less likely to appeal and ALR will indeed provide swift punishment.

The potential increase in caseload may actually encourage the courts to take a closer look at temporary stays. For the judge who is concerned about such a burden, the statutory criteria provide ample grounds upon which to deny a temporary stay in all but a few cases.

### *c. Standard of Review and Burden of Proof*

In district court, the standard of review to be applied is "de novo on the record of the agency."<sup>164</sup> Under a de novo review, the court makes independent findings of fact and conclusions of law based on the evidence that was before the agency.<sup>165</sup> Though in no way bound by the findings of the lower tribunal, where there is a conflict in the evidence, the court will give weight to the fact that the hearing officer saw, heard, and observed the witnesses.<sup>166</sup>

As the district court is acting as an appellate court, no new evidence may be offered by the parties.<sup>167</sup> Evidence that was objected to in the administrative hearing may be challenged, however. If the court determines that evidence was improperly admitted, such evidence will not be considered by the court in its de novo review. Likewise, if the court determines that evidence was improperly excluded, such evidence may be considered.<sup>168</sup>

Though the court makes a finding independent of the Director, the burden of proof at the district court level clearly falls on the motorist. The motorist must establish by a preponderance of the evidence the grounds for reversal of the Director's order.<sup>169</sup> Thus, the district court

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164. NEB. REV. STAT. § 84-917(5)(a)(Cum. Supp. 1992).

165. *Haefner v. State*, 220 Neb. 560, 568, 371 N.W.2d 658, 663 (1985)(Shanahan, J., concurring)("A de novo review by this court necessarily includes finding and weighing facts anew").

166. *Clontz v. Jensen*, 227 Neb. 191, 193, 416 N.W.2d 577, 579 (1987); *Jensen v. Jensen*, 222 Neb. 23, 26, 382 N.W.2d 9, 11 (1986).

167. *Dairyland Power v. State Bd. of Equalization*, 238 Neb. 696, 701-06, 472 N.W.2d 363, 367-69 (1991).

168. *Fremont Nat'l Bank v. Beerbohm*, 223 Neb. 657, 662, 392 N.W.2d 767, 771 (1986)("Just as in a de novo review on the record this court will not consider improperly admitted evidence, it will consider improperly excluded evidence")(citations omitted).

169. *E.g., Jamros v. Jensen*, 221 Neb. 426, 429, 377 N.W.2d 119, 122 (1985).

appeal represents somewhat of a tradeoff for the motorist. The motorist gains a complete review of the Director's order, but must earn such a review by bearing the burden of proof.

## V. FUTURE CHANGES IN NEBRASKA DRUNK DRIVING LAW

The implementation of ALR is by no means the final step in the evolution of drunk driving law in Nebraska. In addition to refining the ALR process, the Nebraska Legislature is likely to implement a number of substantial changes in the near future. In fact, a number of changes have already received the attention of the Legislature.<sup>170</sup>

Probably the most significant change under discussion is a reduction in the legal blood alcohol level from .10 percent to .08 percent. A number of other states have already adopted a level of .08 percent and such a reduction is required to continue to qualify for the federal incentive programs.<sup>171</sup>

More novel approaches have also been considered. Under one proposal, courts would be authorized to require persons on probation for driving under the influence to install ignition interlock devices in their vehicles.<sup>172</sup> With such a device in place, a vehicle cannot be started unless the driver's breath is free of alcohol.

Another proposal would impose a zero-tolerance blood alcohol level on motorists under the age of twenty-one. Under such a provision, a minor operating a vehicle while having a blood alcohol level greater than .02 percent would be guilty of driving while intoxicated or subject to license revocation.<sup>173</sup>

Other significant proposals include seizing the drunken motorist's license plates and registration, increased use of roadside sobriety checkpoints, and use of video equipment to record erratic driving, drunken behavior, and failure of field sobriety tests.<sup>174</sup> As such, the legislative debate over how best to prevent drunk driving will likely resume during the next session of the Legislature and continue for a number of years to come.

## VI. CONCLUSION

LB 291 represents the most significant piece of drunk driving legislation to be enacted in Nebraska in over twenty years. To implement a comprehensive system of administrative license revocation, the new statutory scheme establishes a separate administrative forum as the

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170. See LR 84, *supra* note 8, at 54-65.

171. *Id.* at 60-61, 70.

172. *Id.* at 54, 148-52.

173. *Id.* at 164-66.

174. *Id.* at 54-65.

focal point for "swift and certain" license revocation. Despite these significant changes, the substantive law to be applied in the new forum is relatively settled and tends to favor the State. From a procedural standpoint, the law concerning ALR is much less settled and a number of questions remain unanswered.

Only time will tell whether the Legislature's latest efforts to deter Nebraskans from drinking and driving prove effective. It is clear, however, that the implementation of ALR marks a new beginning point, rather than an ending point, in the fight against drunk driving. A long line of additional proposals await the consideration of the Legislature. At some point, it seems, the statutory provisions in this area will become so ominous that no one will drink and drive. Until that point is reached, however, enforcement efforts will continue and the law in this area will become increasingly complex.

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